

3-18-1976

# Browning Manufacturing Division Emerson Electric Company and Liberty Mutual Insurance Company v. Frank E. Paulus and the Workmen's Compensation Board

Reply Brief 1975-SC-1117

# REPLY BRIEF

534

# SUPREME COURT OF KENTUCKY

File No. 75-1117

BROWNING MANUFACTURING DIVISION,
EMERSON ELECTRIC COMPANY and
LIBERTY MUTUAL INSURANCE COMPANY - Appellants

Versus

FRANK E. PAULUS and the
WORKMEN'S COMPENSATION BOARD - - Appellees

APPEAL FROM MASON CIRCUIT COURT
HON. RICHARD L. HINTON, JUDGE

# REPLY BRIEF FOR APPELLANTS, BROWNING MANUFACTURING DIVISION, EMERSON ELECTRIC COMPANY AND LIBERTY MUTUAL INSURANCE COMPANY



KIRK CLARKE
119 Sutton Street
Maysville, Kentucky 41056

ROBERT G. HUNT
KING, DEEP AND BRANAMAN
Ohio Valley National Bank Building
Henderson, Kentucky 42420
Counsel for the Appellants,
Browning Manufacturing Division
Emerson Electric Company and
Liberty Mutual Insurance Company

I hereby certify that a copy of this Brief has been served upon Appellee, Frank E. Paulus, by mailing a copy thereof to his attorney, Hon. William C. Jacobs, 602 Security Trust Building, Lexington, Kentucky 40507; upon the Workmen's Compensation Board by mailing a copy thereof to its Director, Hon. William Huffman, Department of Labor, Workmen's Compensation Board, Frankfort, Kentucky 40601.

I further certify that a copy has been served upon the trial judge, Judge Richard L. Hinton, Fleming County Courthouse, Flemingsburg, Kentucky 41041, this the 18 day of March, 1976, pursuant to RCA 1.250.

Kirk Clarke

Attorney for Appellants,
Browning Manufacturing Division,
Emerson Electric Company and
Liberty Mutual Insurance Company

ROBERTS PRINTING CO., FRANKFORT, KY.

## TABLE OF CONTENTS AND AUTHORITIES

# SUPREME COURT OF KENTUCKY

**File No. 75-1117**

---

BROWNING MANUFACTURING DIVISION,
EMERSON ELECTRIC COMPANY and
LIBERTY MUTUAL INSURANCE COMPANY - *Appellants*

Versus

FRANK E. PAULUS and the
WORKMEN'S COMPENSATION BOARD - *Appellees*

---

## REPLY BRIEF FOR APPELLANTS, BROWNING MANUFACTURING DIVISION, EMERSON ELECTRIC COMPANY and LIBERTY MUTUAL INSURANCE COMPANY

---

May It Please The Court:

## THE PURPOSE OF THIS BRIEF

The purpose of this brief is to demonstrate that the order of the Mason Circuit Court appealed from was a final and appealable order, despite the argument of the Appellee Frank E. Paulus to the contrary, which argument begins on page 6 of the brief of Appellee Paulus. Furthermore, Appellants believe that a reply is justified to the arguments of Appellee Paulus on the merits of this case, the issue on the merits being directed to whether or not the claim of Appellee Paulus for Workmen's Compen-

sation benefits under the law of Kentucky has been wiped out by his recovery in a third party suit. Appellants will also comment upon the procedural aspects presented by the action of the Mason Circuit Court in overruling the procedural defenses raised by Appellants to the Petition for Review as filed by Appellee Paulus in the Mason Circuit Court.

## QUESTIONS TO WHICH THE BRIEF ADDRESSED

I. Was the order of the Mason Circuit Court of November 7, 1975, which order remanded this proceeding to the Workmen's Compensation Board, a final and appealable order?

II. Has the claim of Appellee Frank E. Paulus for disability benefits under the Kentucky law of Workmen's Compensation (said claim being in the amount of a total potential of $23,800.00) been wiped out by his recovery of $3,920.00 direct from the compensation carrier, $13,327.83 netted by him on the third party lawsuit, and $6,694.42 recovered by him as damages in the third party lawsuit which went to pay his attorney fee for litigation of his claim in the third party lawsuit?

III. Did Appellee Paulus timely and properly perfect an appeal to the Mason Circuit Court pursuant to the provisions of K.R.S. 342.285?

# ARGUMENT

## I.

**THE ORDER OF REMAND TO THE WORKMEN'S COMPENSATION BOARD ENTERED BY THE MASON CIRCUIT COURT ON NOVEMBER 7, 1975 WAS A FINAL AND APPEALABLE ORDER.**

The status of the appealability of the order of the Mason Circuit Court dated November 7, 1975, from which order of remand this appeal is being taken, is governed by the recent case of *Davis v. Baker,* Ky., 530 S.W. 2d 370. In that case it was stated as follows at 530 S.W. 2d 372:

> "In workmen's compensation proceedings, however, it has been consistently held that a judgment setting aside an order of the Board and remanding the case for a different disposition on the merits is appealable. *Jewell Ridge Coal Company v. McDowell,* Ky., 392 S.W. 2d 59, 60 (1965); *Pittsburg & Midway Coal Mining Co. v. Rushing,* Ky., 456 S.W. 2d 816, 818-819 (1969). Obviously the Uninsured Employer's Fund was a beneficiary of the Board's order dismissing the claim, because it was thereby absolved of any possible liability. The judgment of the circuit court re-exposed it. With respect to its standing as a party in interest, we are inclined to think that the claimant conferred that status upon it by making it a defendant and asserting a right of recovery against it. Undoubtedly it has a 'real and direct interest' in the controversy. Cf. *Miller v. Miller,* Ky., 335 S.W. 2d 884, 886 (1960).

Appellee Paulus argues in his brief beginning at page 6 that, in effect, the Board's order of dismissal from which Appellee himself took the appeal to the

Mason Circuit Court was not an appealable order; therefore, Paulus seems to argue that the order remanding the case to the Board could not have been an appealable order. This is indeed a unique contention, and no authority is cited for such a contention. The case of *Green River Fuel Co. v. Sutton,* Ky., 84 S.W. 2d 79 (1935) cited by Appellee Paulus on page 8 of his brief is not in point, because that case was a case where an award was made by the Board, not a case like the case at bar where the Board's order dismissed the claim. At any rate, the basis for the Board's order of dismissal from which Appellee Paulus took his appeal to the Mason Circuit Court is clear in the record, and that is all that is required. The point is, as stated in the case of *Davis v. Baker,* Ky., 530 S.W. 2d 370, that Appellants Browning Manufacturing Division and Liberty Mutual were absolved of any possible liability by the order of the Board, and that the judgment of the Mason Circuit Court re-exposed that liability. This being the case, the order of remand of the Mason Circuit Court appealed from herein was an appealable order.

## II.

**THE CLAIM OF APPELLEE FRANK E. PAULUS FOR TOTAL POTENTIAL WORKMEN'S COMPENSATION BENEFITS IN THE AMOUNT OF $23,800.00 HAS BEEN WIPED OUT OR ERASED BY THE APPLICABLE CREDITS WHICH MUST BE APPLIED AGAINST THAT CLAIM.**

Appellants first note that Appellee Paulus is not seeking medical benefits under the Kentucky law of Workmen's Compensation in this proceeding, as is stated by Mr. Paulus on page 9 of his brief,

the last sentence of the third paragraph thereof. Indeed, as has been emphasized by Appellants in their original brief, the Appellants have directly paid all medical and hospital benefits that have accrued by reason of Mr. Paulus' compensable injury in the amount of $21,505.00, of which $20,108.10 was approved by the Board by its order in the record at T/R 35-8. See the discussion of this matter at the top of page 4 of Appellants' original brief filed herein.

Since the claim of Appellee Paulus is for disability benefits only in the total potential amount of $23,800.00 because of the fact that he has already received from Appellants full and entire payment of all of his hospital and medical benefits, the sole question before this Supreme Court on this appeal is to determine whether or not his total potential claim of $23,800.00 has been wiped out by the applicable credits which must be allowed the employer and its carrier against this claim of Mr. Paulus pursuant to the provisions of K.R.S. 342.055 and 342.700. Mr. Paulus nowhere cites this statute in his brief, except on page 13 thereof. In essence the contention of Mr. Paulus appears to be that, although the Board at T/R 35-8 approved the medical payments up to the amount of $20,108.10, this payment of medical benefits cannot be utilized by the employer and its carrier as a basis for its recovery in the third party suit which was jointly litigated by Appellee Paulus and Appellant Liberty Mutual Insurance Company. *No authority whatsoever is cited by Mr. Paulus in his brief on that proposition.* As a matter of fact, it is not even clear that Paulus is making such a contention, and

Appellants say this because of the footnote in the Paulus brief at page 10 thereof. This footnote reads as follows:

> "Since the judgment is silent as to medical payments, the carrier might not have been entitled to indemnity for them."

We think that to articulate this possible contention of Appellee Paulus is to demonstrate the fallacy of the contention. The contention not only flies directly in the face of the subrogation statutes which are K.R.S. 342.055 and K.R.S. 342.700, but further such a contention is directly contrary to the statement from the case of *Stacy v. Noble,* 361 S.W. 2d 285, found at page 287 thereof and quoted by Appellants at the top of page 14 of their original brief. This statement of law recognizes that medical payment by the employer does afford a basis for a subrogated recovery against the third party tortfeasor.

However, Appellants would like to urge upon this Supreme Court the proposition that the entire argument of Appellee Paulus on the merits is fallacious, in that the argument never faces up to the fact that the issue in this case is not what the employer or its carrier (Appellants herein) recovered in the third party suit; the question here revolves around the question of what Appellee Paulus recovered in the third party suit. One would think that, in reading the brief of Mr. Paulus, or in looking at the "advisory opinion" of the Board beginning in the record at T/R 35-105, that the Workmen's Compensation Board of Kentucky is sitting as a court of equity in order to resolve a dispute between Mr. Paulus and Liberty Mutual concerning whether or

not he was defrauded by Liberty Mutual relative to the disbursement of the funds received from the third party suit. Assuming Appellee Paulus were to make any such contention, which the record shows that he has not, even so the Workmen's Compensation Board of Kentucky does not sit as a court of equity in order to resolve any such imaginary dispute between Appellee Paulus and Liberty Mutual relative to whether or not Mr. Paulus got what he was supposed to have out of the third party suit. Appellants must once again emphasize that the only issue before the Workmen's Compensation Board of Kentucky, and hence the only issue before this Court on this statutory appeal from the order of dismissal of the Board, is whether or not Appellee Paulus has recovered enough money by direct payment from Liberty Mutual plus his recovery in the third party lawsuit to wipe out his total potential claim of disability benefits in the amount of $23,800.00. Since it is clear from the uncontradicted record of this case that he has so recovered an amount in excess of $23,800.00, plus full payment of all medical and hospital expenses direct from Liberty Mutual, then he has no claim for disability benefits in this proceeding and the Board acted properly in dismissing his claim for benefits.

At the bottom of page 11 of the brief of Appellee Paulus, it is stated that his net recovery is $17,253.33, being the disability benefits paid in the amount of $3,920.00 plus his net recovery in the third party action of $13,333.33. This statement overlooks the uncontradicted fact that Mr. Paulus also

recovered as damages within the meaning of K.R.S. 342.055 and K.R.S. 342.700 the sum of $6,694.42 which was paid for his benefit to his attorneys on his liability for securing his recovery against the third party tortfeasor. Appellee Paulus fails to make any argument in his brief that this figure of $6,694.42 was not a proper charge against his claim of disability benefits in this proceeding. In effect, Appellee Paulus allows any potential "issue" of this fact of applicable credit to go by default insofar as his brief is concerned. Of course the applicable law of Kentucky has already resolved that issue against Appellee Paulus, as held in the case of *Stacy v. Noble,* Ky., 361 S.W. 2d 285 at page 289 and in the portion of the opinion from that case quoted by Appellants in the middle of page 12 of their original brief. What could be a more reasonable resolution of this problem than to say, as was said in *Stacy v. Noble,* that in a joint suit between employee and the employer against a third party tortfeasor that "whoever takes the money is chargeable with a share of the fee"?

This being the state of the law and the facts in this case, then Appellee Paulus has received the sum of $23,942.25, or $142.25 in excess of his total potential recovery of $23,800.00 for disability benefits, as tabulated in the middle of page 11 of Appellants' original brief herein.

Of course it is also a fallacy to state, as Appellee Paulus states at the bottom of page 11 of his brief, that his total net recovery is $17,253.33, which as noted overlooks his recovery of the applicable attor-

ney fee in the amount of $6,694.42. It also overlooks his recovery of medical and hospital expense in the total amount of $21,505 paid direct to the doctors and hospitals by Liberty Mutual.

III.

**APPELLEE PAULUS FAILED TO PERFECT A TIMELY AND LAWFUL APPEAL PURSUANT TO K.R.S. 342.285 TO THE MASON CIRCUIT COURT.**

Appellants intend to say nothing more about the procedural aspects of this case, over and above what Appellants have already said beginning at page 19 of their original brief. However, Appellants would like to point out that to rule that Appellee Paulus timely and lawfully perfected his appeal to the Mason Circuit Court would require an overruling of the square holding of *Thacker v. R. F. Coal Company,* Ky., 332 S.W. 2d 532 cited at page 20 of Appellants' original brief, and *Blue Grass Mining Company v. North,* 265 Ky. 250, 96 S.W. 2d 757 (1936) cited at page 21 of the Appellants' original brief.

## CONCLUSION

For the reasons stated, the order of remand to the Workmen's Compensation Board entered by the Mason Circuit Court on November 7, 1975 should be reversed with a mandate directing affirmance of the Board's order of dismissal rendered by the Board on May 19, 1975 by the order of record at T/R 35-92. Appellants erroneously stated in their original brief in the first sentence of the conclusion that the Board's order of dismissal was entered on June 9, 1975. This

was the date of the Board's order overruling the Petition for Reconsideration as filed by the Appellee Paulus under the provisions of K.R.S. 342.281. This date of June 9, 1975 was of course the beginning date for figuring the appeal time of twenty (20) days to the Mason Circuit Court. However, the Board's order of dismissal that should be affirmed by mandate directed by this Supreme Court to the Mason Circuit Court was dated May 19, 1975.

Respectfully submitted,

KIRK CLARKE
119 Sutton Street
Maysville, Kentucky 41056

ROBERT G. HUNT
KING, DEEP AND BRANAMAN
Ohio Valley National Bank Building
Henderson, Kentucky 42420
*Counsel for Appellants,*
*Browning Manufacturing Division,*
*Emerson Electric Company and*
*Liberty Mutual Insurance Company*